

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

vs.

Criminal No. 13-270

ATIBA WARREN,  
Defendant.

Transcript of Pretrial Proceedings on Monday, October 19,  
2015, United States District Court, Pittsburgh, Pennsylvania,  
before Mark R. Hornak, District Judge.

APPEARANCES:

For the Government:

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Proceedings recorded by mechanical stenography; transcript  
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1 (Proceedings held in open court; Monday, October 19, 2015.)

2 THE COURT: We're here this morning in the case of  
3 the United States of America versus Atiba Warren pending on the  
4 docket at 13-CR-270.

5 Will counsel for the United States please enter  
6 their appearance.

7 MS. KING: Katherine King for the United States.

8 MR. ORTIZ: Jonathan Ortiz.

9 THE COURT: Good morning.

10 Will counsel for Mr. Warren please enter his  
11 appearance.

12 MR. SINDLER: Mark Sindler.

13 Good to see you also, Mr. Sindler.

14 We're here for the pretrial conference in this case.  
15 Everyone can remain seated at counsel table throughout the  
16 proceeding.

17 Mr. Warren, you can actually pull that mic closer to  
18 you in the event you need to speak today so we can hear  
19 everyone.

20 This case is set for trial a week from today with  
21 jury selection beginning shortly after 9:00 a.m. as we can get  
22 the jury up here.

23 Ms. King and Mr. Ortiz, is the United States  
24 prepared to proceed at that time?

25 MS. KING: Yes, Your Honor.

1 THE COURT: Mr. Sindler, is the defense prepared to  
2 proceed at that time?

3 MR. SINDLER: Yes.

4 THE COURT: Counsel, I'm anticipating two alternates  
5 in addition to the 12 seated jurors.

6 Does anyone see that as being a problem?

7 MS. KING: No, Your Honor.

8 THE COURT: Mr. Sindler?

9 MR. SINDLER: No, Your Honor.

10 THE COURT: Mr. Sindler gets ten peremptory  
11 challenges and the United States gets six, correct?

12 MS. KING: Yes, Your Honor.

13 THE COURT: We're going to need 30 -- we're going to  
14 have in excess of 50 jurors brought up for the venire panel  
15 that will be up here.

16 It's my practice to do the general questions, which  
17 elicit simply a yes or no answer in the courtroom. Any  
18 follow-up we do back in chambers. I have found it too hard to  
19 do standing at sidebar, and it's uncomfortable for the jurors  
20 and they never know who can hear what.

21 What I try and do is using the standard voir dire  
22 questions that are in the local rules and then suggested ones  
23 from you is phrase them so that they are capable of a yes or no  
24 question. We'll have each member of the panel stand in turn,  
25 state their juror number and read their answers to the standard

1 questions that come from the juror questionnaire, I'm juror  
2 number whatever, I do this for a living, I'm this old, all of  
3 those things.

4 I will ask questions based on your requested voir  
5 dire and ask them to stand and state their juror number only if  
6 their answer is yes. If their answer to the question is no,  
7 they remain seated.

8 If you would like, during the time that they're  
9 doing that, if counsel wants to slide their chairs to the other  
10 side of the counsel table so you can see the jurors, you're  
11 more than welcome to do that. You don't have to ask permission  
12 and we'll allow you to do that so that you can take whatever  
13 notes you want and those sorts of things.

14 We keep a master list, Mr. Babik does as we're going  
15 through. If, for example, the fourth juror in the first row  
16 has no yes answers, they're automatically in the group of 30  
17 that we need to strike from.

18 If the sixth person in the first row has one yes  
19 answer or six yes answers, one yes answer gets you a visit to  
20 chambers. What I'll do is I'll note which question and I'll  
21 read it that they said yes to, and I'll ask the juror,  
22 prospective juror something like, I noted you said yes to  
23 question No. 17, which you recall was as follows. Can you  
24 please tell us why you said yes. Just let them talk. I will  
25 then ask some follow-up.

1           As long as counsel behaves, I will let you ask some  
2 follow-up. What I'll do is I'll try to alternate who gets to  
3 ask the follow-up for each one, but I'll say something like,  
4 Ms. King, do you have any follow-up for Juror No. 172? And you  
5 may or may not.

6           Then I'll say Mr. Sindler, do you have any follow up  
7 for Juror No. 182.

8           As a result of your follow-up, I think there's  
9 something else to be brought out, then I'll do that.

10           What we'll then do is we'll have that juror leave  
11 chambers and Mr. Babik or another member of my staff,  
12 Mr. Greer, Mr. Zimmerman, will bring them back out here.  
13 Before we bring the next person in, I'll ask you if there are  
14 any issues for cause. I'll make any rulings at that time and  
15 we'll know that that person is still in the loop or not in the  
16 loop. Once we get a little bit of a rhythm going, it goes  
17 pretty well. It probably is more time consuming than just  
18 trying to do it at sidebar, but for me, and I suspect for  
19 counsel, it allows a little more accuracy and a little more  
20 reflectiveness.

21           Ms. King, Mr. Ortiz, if we do it that way, does the  
22 United States have any problem with that?

23           MS. KING: No, Your Honor.

24           THE COURT: Mr. Sindler, does that all work for you?

25           MR. SINDLER: Yes, you're fine.

1           In your experience on the bench in the last four or  
2 five years --

3           THE COURT: Four.

4           MR. SINDLER: In a single defendant criminal trial,  
5 is it your sense that it will take the better part of the day,  
6 or are we going to start getting into openings and testimony on  
7 the 26th?

8           THE COURT: That's a terrific question, Mr. Sindler.

9           I've had only single defendant -- all of the  
10 criminal trials I've had have been single defendant. The first  
11 couple we got it all done in one day -- we got the jury  
12 selection all done in one day and we may have had the openings.

13           In the other one, we didn't get the jury selected  
14 until the following morning. I don't know why that was. There  
15 was -- the first one was a single count, the next one were six  
16 counts but they were all related. It was a white collar  
17 financial crime type thing and it just took a little longer.  
18 It involved bankruptcy and it turned out we had a surprising  
19 number of jurors that had either been through bankruptcy or had  
20 family members go through bankruptcy, so the follow-up ended up  
21 being from where I sat surprisingly extensive.

22           I think in all likelihood, we should not plan on  
23 more than the jury selection and perhaps openings for Monday.  
24 I'm fine if counsel want to agree that that's all we'll do,  
25 with the risk being that the jury selection goes really fast

1 and they're done at three o'clock rather than four-thirty.

2 Ms. King and Mr. Ortiz, you have to go first, so.

3 MS. KING: We are fine with starting with the  
4 evidence on Tuesday morning, Your Honor.

5 THE COURT: Tuesday morning right off the bat?

6 MS. KING: Yes.

7 THE COURT: Mr. Sindler, does that cause you any  
8 heartburn if we do jury selections and openings on Monday?

9 MR. SINDLER: Not at all.

10 THE COURT: I think you can tell your witnesses you  
11 don't need them for Monday.

12 If you want them, Ms. King, whoever you're going to  
13 have seated with you at counsel table, if you want them to be  
14 seen, they should be here.

15 But I'm fine with that. Frankly, I suspect the jury  
16 will be also.

17 Mr. Babik, have you posted my trial tips?

18 MR. BABIK: I believe I have.

19 THE COURT: The one thing I really try to do is tell  
20 the jury that absent something really compelling, we get them  
21 out of here at 4:30 each day, particularly if we have someone  
22 coming from a distance. If that means on a given day we're  
23 done at 4:20 because the next witness or the cross-examination  
24 is going to take more than five or ten minutes, we will send  
25 them home.

1           Let's talk about your proposed voir dire.

2           I will post maybe as early as today the Court's  
3 proposed opening instructions to the jury and the voir dire.  
4 Each of you have submitted your witness list -- when I post  
5 them, when it's the -- any material that is for the benefit of  
6 counsel before it's done in open court, I post it as Case  
7 Participants Only so you can see it, but somebody that has a  
8 Pacer account can't. Once we do the voir dire and once I do  
9 the opening instructions, Brian will lift the Case Participants  
10 Only flag because it has happened in the courtroom.

11           I'll put them as the Court's Proposed Final  
12 Instructions as Case Participants Only, you'll get to see them,  
13 but they will not be open on the docket until the instructions  
14 are actually given.

15           When it comes to the voir dire, I go through the  
16 list of witnesses. You have each sent me those separately.  
17 They're under seal.

18           I can post the voir dire just simply with a paren,  
19 Judge reads names of witnesses because you know who your  
20 witnesses are, but then come Monday morning, they're all going  
21 to be out there.

22           Do you have a preference, Ms. King?

23           MS. KING: We have no secrets.

24           THE COURT: Mr. Sindler knows who your witnesses  
25 are?



1 MS. KING: Yes, he does.

2 THE COURT: Mr. Sindler, do you have a preference?

3 MR. SINDLER: The later the better.

4 THE COURT: We'll work through that.

5 Mr. Sindler, do you know at this point -- and you're  
6 not bound by what you tell me but you may know, do you know  
7 whether you're going to give your opening right after the  
8 government's or wait until the close of evidence?

9 MR. SINDLER: I don't wait.

10 THE COURT: You come right at them.

11 It shapes how I phrase it in my opening instructions  
12 to the jury.

13 Ms. King and Mr. Ortiz, do you have any objections  
14 to any of the voir dire questions requested by Mr. Sindler?

15 And Mr. Sindler, I'll be asking you the same  
16 question about the government.

17 MS. KING: Yes, Your Honor.

18 THE COURT: Which ones does the United States have  
19 an objection to as requested by Mr. Sindler?

20 MS. KING: On Page 2, Paragraph 6, this is not  
21 really a question. I don't know if the defendant is requesting  
22 the Court read this to the prospective jurors.

23 THE COURT: I didn't sense that. I sense it was  
24 Mr. Sindler asking me to ask the individual questions in  
25 private.

1 MS. KING: Which we don't have a problem with, but  
2 we would request this not be read to the jury.

3 THE COURT: I didn't view 1, 2, 3, 4, 5 or 6 as  
4 being anything that is said to the prospective jurors but is  
5 being said to me in terms of how Mr. Sindler wants me to do it.

6 Was I correct, Mr. Sindler?

7 MR. SINDLER: It was a forward, yes.

8 THE COURT: As it turns out, that pretty much is how  
9 we do it.

10 MS. KING: With respect to Paragraph 7(c), it's the  
11 government's position that this question really is covered by  
12 Question (b), 7(b) and so I think that 7(b) is sufficient,  
13 however, it's up to the Court whether to read 7(c) or not.

14 THE COURT: Let me ask Mr. Sindler this about (b)  
15 and (c).

16 Mr. Sindler, I suspect, just as Ms. King and  
17 Mr. Ortiz do, you choose your words and phrasing with  
18 precision. If I read something along the lines of (b) and/or  
19 (c) or some combination of them, do you want me to refer to  
20 Mr. Warren as a black male, a black man, an African-American  
21 male, an African-American man?

22 MR. SINDLER: I'll need a moment.

23 THE COURT: We'll give you a moment.

24 (Whereupon, there was a brief pause in the proceedings.)

25 MR. SINDLER: It's fine the way it is, black male,

1 talking to Mr. Warren.

2 THE COURT: I will ask, there is a U.S. Supreme  
3 Court case called Hamm versus South Carolina that says the due  
4 process clause requires that a question along at least the  
5 lines of 7(b) be asked, if requested, and I'm going to ask it.

6 I'll look at whether --

7 Mr. Sindler, do you believe (b) or some expansion of  
8 (b) does the trick? Or do you want (c) also?

9 MR. SINDLER: I don't file things to fill space, so,  
10 I don't believe that even though (c), Charlie, may overlap (b),  
11 beta, they're different in their own respects and in their own  
12 rights.

13 THE COURT: Okay, we'll take a look at it.

14 Ms. King.

15 MS. KING: With respect to 7(r), which says: Do you  
16 believe that Mr. Warren is required to testify in this case or  
17 provide his version of what occurred?

18 The government did have the opportunity to look at  
19 the Court's sample voir dire and I think that Question 32 of  
20 the Court's sample voir dire, which is on Page 23, which says  
21 that: I shall also instruct the jury that the defendant in a  
22 criminal case does not have to testify or present any evidence  
23 on his own behalf and that decision to not do so is not to be  
24 considered evidence against him of his guilt.

25 Do you have any doubt or reservation about being

1 able to follow this instruction?

2 I feel like that might be the same. We don't have a  
3 problem with (r), but if the Court was going to use its sample  
4 voir dire.

5 THE COURT: A number of the ones that both  
6 Mr. Sindler and that you've asked for touch on both similar  
7 topics.

8 Mr. Sindler, do you have a strong feeling either  
9 way?

10 MR. SINDLER: I have just found in the cases I've  
11 tried over the last several years that people answer honestly  
12 that they want to hear from the defendant in a case in which  
13 he's being criminally tried. And we are being a bit redundant  
14 there, we are, but I think it's important for that reason  
15 because people do have an innate desire to hear from the  
16 defendant when it's not his obligation at all to do that.

17 THE COURT: I'll take a look at it. I'll try and  
18 ask -- I'll see whether or not there are very direct but not  
19 insulting ways -- I'm not saying your suggestion was insulting,  
20 but that it directly gets to the topic. So I understand,  
21 Mr. Sindler.

22 Ms. King?

23 MS. KING: That's all, Your Honor.

24 THE COURT: Mr. Sindler, I had one, I'm not saying I  
25 won't give it, I tend to resolve doubts in favor of asking

1 questions that lawyers want asked.

2 I am a curious sort, Question (f): Have you or a  
3 member of your immediate family ever been employed as a  
4 firefighter or affiliated with any fire department?

5 I don't think it goes to any intrinsic privacy  
6 interest, so I'm not bothered by asking it, I just -- I was  
7 trying -- you don't have to reveal any trial strategies,  
8 Mr. Sindler, but it was a curiosity. If you can't answer it,  
9 that's fine.

10 MR. SINDLER: I'd rather stand down on that.

11 THE COURT: Okay, I'm going to ask it.

12 Mr. Sindler, do you have any objections to any  
13 question that was proposed by the United States?

14 MR. SINDLER: We don't, no.

15 THE COURT: We'll get those taken care of and should  
16 get them posted probably this afternoon.

17 So then it appears that for trial purposes, the only  
18 other question that the parties have disagreement on is some of  
19 the exhibits, exactly what is going to be offered and what  
20 isn't. So, we'll look at the joint exhibit list, which is ECF  
21 104.

22 There is an objection from the United States to five  
23 exhibits to be proposed to be offered by the defendant, J, as  
24 in John through N, as in Nancy.

25 Ms. King, let me ask you this. Putting aside the

1 video, which is at J, is the concern of the United States or as  
2 a principle or maybe exclusive basis of the objection that it  
3 shows a digital depiction of a human being.

4 MS. KING: That is one of our concerns, Your Honor,  
5 yes.

6 THE COURT: So let me ask you this. If the witness,  
7 that generated them did not show the human being but showed  
8 what the Court would describe as looking down on the first  
9 floor as though the roof and second floor had been removed and  
10 had the arrows with distances to certain points, would the  
11 United States still be objecting?

12 MS. KING: Well, as the government did point out in  
13 our filings, Your Honor, I don't know what basis there is for  
14 the distances, in fact. I'm not arguing that those are, in  
15 fact, 18 feet, 22 feet, et cetera, but I don't know what  
16 witness is going to testify about the relevance of those  
17 distances.

18 THE COURT: Relevance would seem to me to be an  
19 argument, that it matters that the one distance -- I'm going to  
20 open up my copy of the exhibits here, so let's look at K.

21 K has no distances on it. It does have a digital  
22 representation of a human being.

23 L shows a distance measured with a green line of 18  
24 feet from a point to a different point.

25 So, I guess the question is, Mr. Sindler, are you

1 going to make an argument -- you don't have to tell the Court  
2 or the United States what it is -- but is there going to be an  
3 argument that it matters that it's 18 feet as opposed to 16  
4 feet or 22.3 feet or something like that?

5 MR. SINDLER: We --

6 THE COURT: Or it's just helpful to know how far  
7 that is?

8 MR. SINDLER: We made several remarks back in March  
9 that given the sight line that Mr. Sywyj was operating on from  
10 the position he took at the front of the house looking into the  
11 dining room. I'm not going to stand up here and say, well,  
12 gee, Sywyj saw Mr. Warren 26 feet away. But there is argument  
13 to be made with respect to where Mr. Warren was, and as  
14 arbitrary as the government may seem that we were in depicting  
15 certain distances, those are just three different distances.  
16 We could have done 18 1/2 feet, I suppose, or 21 feet, but I  
17 picked closest to the archway that separates the front room  
18 from the dining room. We picked a position that is somewhat in  
19 the middle of the dining room. We also picked a position that  
20 is somewhat around where you would come off of or go up the  
21 stairway to the second floor. A lot of this was dependent upon  
22 testimony that was received from Estelle Hayes, and the jury is  
23 entitled to have, if we can provide it, evidence that  
24 demonstrates her testimony that provides context for where the  
25 police or the government says this crime scene evolved from or

1 developed from. And that's all that we're trying to do.

2 THE COURT: Let me ask you this, Mr. Sindler.

3 One of the arguments made by the United States was,  
4 and I've not gone back and re-read the 188 pages of the  
5 suppression hearing transcript, but I will, there was no  
6 witness at the suppression hearing that placed a human being,  
7 contended by the government, to be Mr. Warren at the spot that  
8 the person from Cadnetics put that virtual depiction of a human  
9 being at.

10 Do you have any different thoughts on that?

11 MR. SINDLER: No. My thoughts are consistent with  
12 that. The record does not show that he was at that exact spot  
13 at some point. He was in the room at that point because -- or  
14 rather it's proper argument from us, given Ms. Hayes'  
15 testimony, that he was asleep upstairs, there's no other way  
16 downstairs to this first floor, according to her, and that he  
17 would have had to have come from that stairway and gone to his  
18 right, so to speak, to eventually be seen by Mr. Sywyj. I  
19 think it's proper argument to put him somewhere in the room.  
20 We're not recreating the crime scene, but it is based upon  
21 testimony that has been and will hopefully be --

22 THE COURT: The guts of the government's argument is  
23 that when any rational juror looks at this, no matter what you  
24 argue, Ms. King argues, or I instruct them, they'll view it as  
25 a reconstruction of the crime scene. I think that's part of



1 the guts of the government's argument.

2 MR. SINDLER: I'm sorry for interrupting. So often,  
3 Judge, and like other sister or brother jurors in this  
4 district, judges often in jury selection, not during a trial,  
5 will instruct jurors that despite what they may be thinking to  
6 perhaps see things a different way. I believe it's unfair to  
7 say that, well, gee, no matter what it is that I as a judge  
8 say, that they're still going to come --

9 THE COURT: I said that was the government's  
10 argument.

11 MR. SINDLER: But it is argument.

12 THE COURT: Let me ask you this, Mr. Sindler. Is  
13 your presentation of what I'll call the still graphic, the  
14 non-video, is it impaired if your witness uses them exactly as  
15 they are but without a human being being shown in it? All the  
16 arrows, all the distances, everything remains exactly the same,  
17 and then you make whatever argument when you have any witness  
18 on the stand, or Ms. King, if you're on cross-examination, make  
19 any argument you want, or ask any series of questions about  
20 placements of people without it being shown on there?

21 MR. SINDLER: That would resolve the matter for now  
22 in terms of permitting us to use this material, which is --

23 THE COURT: K, L, M, N.

24 MR. SINDLER: K through N, Nancy.

25 THE COURT: Ms. King, help me understand. If the

1 human being wasn't shown on K through N, what would be the  
2 government's objection to its admissibility or use at trial?  
3 Reserving all of your arguments, and Mr. Sindler having all of  
4 his.

5 MS. KING: I think, again, Your Honor, with the  
6 removal of the figure, it's not as problematic. However, just  
7 generally, a top-down view of the room, in the government's  
8 review of all of the evidence that has come out at the hearing  
9 in this case and all of the filings, it doesn't really go to  
10 any fact that's at issue in this case. Officer Sywyj was  
11 not -- did not have a top-down view of the room, no one had a  
12 top-down view of the room, so I just don't see how a top-down  
13 view would help the jury to resolve any facts that are in  
14 issue, particularly when we do have photographs, actual  
15 photographs of the residence.

16 THE COURT: Here are photographs I have, Defendant's  
17 Hearing Exhibits A1, A2, A3, A4, which are all exterior; A5,  
18 which is interior; A6, which is interior; A7, which is  
19 interior; A8, A9.

20 Are those all potential trial exhibits, Mr. Sindler?

21 MR. SINDLER: Those are mine.

22 THE COURT: Right.

23 MR. SINDLER: I have to renumber them, but that's  
24 true.

25 THE COURT: Ms. King, do you have any objection to

1 any of those?

2 MS. KING: No, Your Honor.

3 THE COURT: Then, we have from Mr. Sindler's  
4 presentation at the hearing, we have C1 through 3, which appear  
5 to be generated by Cadnetics.

6 Are these being proposed as exhibits, Mr. Sindler?

7 MR. SINDLER: No.

8 THE COURT: Then we have D1 and 2, which were  
9 generated by Cadnetics.

10 Are these being proposed, Mr. Sindler?

11 Feel free to come up if you need to get a closer  
12 look.

13 MR. SINDLER: No.

14 THE COURT: Then, Mr. Sindler, it appears that the  
15 H series of exhibits from the suppression hearing are the four  
16 we're talking about here, only -- yes, they are, only they're  
17 lighter than shown here.

18 MR. SINDLER: They're lighter on paper, but we'll be  
19 using the electronic version if they're admissible.

20 THE COURT: The electronic version appears to be  
21 brighter than the printed version.

22 MR. SINDLER: That's true.

23 THE COURT: Those are the ones you want to use.

24 Let me ask you this, Ms. King.

25 Is your objection for the United States an objection

1 to the admissibility as an exhibit or objection to the use as a  
2 demonstrative at trial?

3 Here's the reason I'm asking the question.

4 Let's assume 20 years ago we have a white board here  
5 or a flip chart, are you saying it would be objectionable if  
6 Mr. Sindler, or you, got up and drew a floor plan?

7 MS. KING: No, Your Honor. But that also would not  
8 constitute expert testimony. It's our position that this still  
9 is an expert opinion. I can't -- I do not know how and I don't  
10 know many people that are capable of creating a rendering like  
11 this. So it's our belief that this is still subject to Rule  
12 702, and specifically, I do not believe that the defendant has  
13 shown how this fits the fact that is at issue. I don't have --

14 THE COURT: I think one of the facts at issue is,  
15 Mr. Sindler's argument or opening or both, he's going to argue  
16 that the United States has not proven beyond a reasonable doubt  
17 that Mr. Warren was in the possession of a firearm --

18 MS. KING: Yes, Your Honor.

19 THE COURT: -- on the night in question.

20 MS. KING: These top-down views do not show any  
21 person that was in that residence.

22 THE COURT: Right, but it also doesn't show the  
23 furniture, the couches, the other stuff, but it does show the  
24 layout of the house.

25 I guess I'm -- I didn't sense with Mr. Johnson's

1 testimony when he testified, it occurred to the Court where I  
2 said in my suppression opinion that I was giving Mr. Johnson  
3 the benefit of the doubt, it really, the benefit of the doubt  
4 on 702 issues went to lighting. And Mr. Johnson was quite open  
5 on the stand when he said he was not engaged to and he was not  
6 opining on what anyone could or couldn't see on the night in  
7 question, that he does drawings. But I never sensed that there  
8 was any question about either the mechanisms he used or the  
9 accuracy of the results in generating these four still overlays  
10 that were here.

11           There was a question that was specifically asked of  
12 him by I believe you, which was you have -- you show a  
13 gentleman standing at the bottom of the stairs and the question  
14 was something like, how did you know to put him there? And his  
15 answer was, that's where Mr. Sindler told me to put the person.  
16 Which there was nothing wrong in Mr. Sindler telling him that,  
17 and there was nothing wrong in him doing that, but it was not  
18 based on any evidence in the record. But if the gentleman,  
19 human being is not shown on the graphic and there's no question  
20 as to the reliability of the methods, there's no question as to  
21 the outcome of the measurements, what would be the fit issue?  
22 Because fit usually is, here's the evidence, and the expert is  
23 giving an opinion based on something other than the evidence  
24 that is in the record. But if it's undisputed that his  
25 mechanism is accurate and it really is 18 feet on the one arrow

1 and 22 on the other and 26 on the third --

2 MS. KING: I think specifically with those  
3 measurements, Your Honor, Mr. Sindler just said those are  
4 measurements that he just picked. So, while it's all well and  
5 good that those measurements are accurate, how are those  
6 measurements going to be used? I can't ask him to tell me now,  
7 but if he's going to say Mr. Warren was standing at 26 feet  
8 away, there's no evidence for that in the record. So that's  
9 our real concern with those measurements being placed --

10 THE COURT: Mr. Sindler, do you have any reason to  
11 believe that if Mr. Johnson testifies that he's going to offer  
12 in any form in his oral testimony that he has any idea where  
13 anyone was standing that night?

14 MS. KING: Your Honor, I'm not saying that I think  
15 Mr. Johnson would testify to that. When Your Honor said --

16 THE COURT: The only question to admissibility is to  
17 what Mr. Johnson testifies.

18 Mr. Sindler is going to be free to argue that  
19 Mr. Warren -- I'm not saying he will or won't argue it -- but  
20 he'll be free to argue Mr. Warren wasn't even in the room that  
21 night, if he wants, he'll have to have some facts to argue  
22 from.

23 MR. SINDLER: Mr. Johnson is not going to say  
24 anything about where Mr. Warren was standing at a given time or  
25 a given point that night in the room or at what time. But,

1 this is argument. I'm repeating myself when I say that I'm  
2 permitted to give the context and the perspective to twelve  
3 strangers, plus the two alternates who, unlike all of us in  
4 this room, don't have the foggiest idea what happened that  
5 night. So, it's just a way to make them become in a couple  
6 days they're going to be together as familiar as possible with  
7 the alleged crime scene.

8 THE COURT: I think as to the still photos,  
9 Ms. King, I think Mr. Sindler's argument carries the day. If  
10 there's no question about that that actually is the floor plan  
11 of the home in question and that those arrows are actually that  
12 length.

13 MS. KING: I guess the government's question is what  
14 witness will be testifying to show that those are relevant  
15 distances in this case? Mr. Johnson's testimony is separate  
16 and apart --

17 THE COURT: You and Mr. Ortiz and Mr. Sindler make  
18 things relevant. Witnesses testify to facts.

19 MS. KING: What witness will testify about the  
20 factual basis for the placement of those specific measurements  
21 within the rendering? That is something --

22 THE COURT: Mr. Johnson, I suppose, will say in  
23 response to either a question by Mr. Sindler or  
24 cross-examination by you, how do you know that was 18 feet? I  
25 measured it.

1 MS. KING: To what fact that's at issue in this case  
2 do those distances apply? That's our problem with those  
3 measurements. Those distances do not fit any issue that is  
4 contested in this case, that the government is aware of. So  
5 for him to just arbitrarily put in random distances in the  
6 exhibit -- I understand that he can testify that that is in  
7 fact 18 feet, that is in fact 22 feet, but to what disputed  
8 issue do those particular measurements go?

9 THE COURT: Isn't it relevant -- isn't a fact  
10 relevant if it makes a fact of consequence more or less likely?  
11 A fact of consequence here is, was Mr. Warren observed  
12 possessing a firearm?

13 MS. KING: Yes, Your Honor. Those particular  
14 distances, I don't see how they go to that, especially when the  
15 only testimony which was given by Officer Sywyj says that he  
16 was just beyond the door frame. So to put an arrow that goes  
17 back to 26 feet --

18 THE COURT: He could have put an arrow through the  
19 back window into the backyard. I don't mean to be a wise guy  
20 about it, and then you would argue if Mr. Sindler made  
21 something up that through his examination of witnesses or in  
22 his closing argument, you do get to go last, you get to go  
23 twice in closing and you get to go last, wouldn't you be in a  
24 position to argue, ladies and gentlemen of the jury, you heard  
25 about all sorts of distances here, don't let that confuse you,



1 here's what X testimony was, Y testimony was, Z testimony was.  
2 But I don't know that Mr. Sindler is not allowed, so that the  
3 jury can have context, rather than wondering how far was it  
4 from the doorway to the bottom of the steps? Well, it's 26  
5 feet. How far was it from the doorway, the entrance doorway  
6 off the front porch to the middle of the room? It's 22 feet.  
7 How far was it from the entrance doorway to just inside the  
8 living room? That's 18 feet. I don't know -- I guess I can't  
9 say it's irrelevant at the moment and the proponent of the  
10 evidence, I think, has made the case that it's relevant for the  
11 jury to have some understanding of the scene and some context  
12 of the distances.

13 MS. KING: It's our position that the photographs  
14 provide that. And those are actual photographs of the  
15 residence. Jurors, most of them live in some type of house,  
16 apartment, and have a general sense for how big a room is.

17 THE COURT: How is this prejudicial to the United  
18 States if I allow it in?

19 MS. KING: Are you talking about just the distances  
20 and not the figure? I do think the figure is very prejudicial.

21 THE COURT: Unless there is somebody who takes the  
22 stand, anybody, and says, that's approximately where Mr. Warren  
23 was standing.

24 MS. KING: Yes.

25 THE COURT: I think, I think the figure being in

1 does go to fit because there was no testimony at the  
2 suppression hearing that placed Mr. Warren at the bottom of the  
3 steps when he was -- when Officer Sywyj said he saw him.

4           So, I think the figure does go to fit, but without  
5 the figure in there, how do the four top-down schematics  
6 prejudice the United States, particularly if the photos are  
7 also in because then they provide context in two directions?

8           MS. KING: Again, Your Honor, I do think that the  
9 distances themselves, it's the same as the figure, there's no  
10 one that will testify that those distances have any basis in  
11 fact in this case. So we just think that showing those to the  
12 jury -- that's something they'll look at and say, look at these  
13 distances, it's right there. Instead of them seeing the whole  
14 room. It's would be one thing if it was just one line saying  
15 2, 3, 4 feet.

16           THE COURT: It's your job, yours and Mr. Ortiz's, as  
17 advocates to tell the jury what to pay attention and what  
18 weight to give it, just as Mr. Sindler will do that on  
19 Mr. Warren's behalf.

20           For the time being, I'm going to overrule the  
21 objection as to what we'll call the overhead views that are in  
22 Exhibits K, L, M, and N, if the figure of the human being is  
23 removed.

24           The other thing is, I don't anticipate we're going  
25 to hear from Mr. Johnson or see these --

1                   Let me ask you this, Mr. Sindler.

2                   Are you going to use these possibly on  
3 cross-examination of a government witness? I guess you might.

4                   MR. SINDLER: It's hard to say.

5                   THE COURT: I'm going to let those in. I'll allow  
6 counsel to use those with the figure removed, with the figure  
7 of the human being removed.

8                   Now, I anticipate, and I -- it's not obvious to the  
9 Court what the objection would be, that when they're used with  
10 various witnesses, each of you might ask them to do things  
11 along the line, or not along the line, or somewhere else in the  
12 room. Once they're usable, they're usable by both sides, and  
13 you're going to ask -- may ask witnesses about them, but I'll  
14 let those in.

15                   So let's talk about the video.

16                   Mr. Sindler, what would you anticipate Mr. Johnson's  
17 testimony to be regarding the video?

18                   MR. SINDLER: The animation that he did is the  
19 daylight version. We did not use the nighttime version. We  
20 did not use the hybrid, if you remember that, which is a  
21 combination of both day and night. It doesn't get much  
22 brighter, if you will, than what is shown in Exhibit J. It's  
23 30 seconds. The animation begins from outside of 520 Lincoln  
24 Avenue and takes you --

25                   THE COURT: From the sidewalk up the steps.

1 MR. SINDLER: Up the back, through the front door,  
2 through both rooms.

3 The reason that this is important is because that is  
4 the general path that both government witnesses -- well, I  
5 don't think Ms. Hayes testified to it, but --

6 THE COURT: She was inside the house.

7 MR. SINDLER: I would concede that Mr. Sywyj took  
8 that path upon arriving at 520 Lincoln Avenue. I would also  
9 concede he stood at the doorway, although we'll dispute  
10 infinitum when he entered the house.

11 But in any event, he did go into the doorway, and he  
12 did go inside of the house in the direction that the animation  
13 shows to retrieve the firearm from what we call the dining  
14 room, which is that middle room that has the stairway that can  
15 be ascended or descended from the second floor. We're not  
16 depicting the place at which he found the firearm. We're not  
17 depicting any possessions because, again, the animation shows a  
18 first floor that is devoid of any personal property, if you  
19 will, and --

20 THE COURT: The A series of photographs show all  
21 that.

22 MR. SINDLER: Show that, but that's as of February  
23 9, 2015.

24 So, whether or not that was the same as two and a  
25 half years before, we don't know, but it's the same property

1 except for the paint on the wall, I suppose. But that's no  
2 longer an issue because lighting is now out. That's what it  
3 would show.

4 THE COURT: Ms. King?

5 MS. KING: Again, there's a figure in the animation,  
6 so we do have an objection to that.

7 Just generally with respect to the video, we're not  
8 contesting that that generally is the path that Officer Sywyj  
9 took, however, he was on the porch for a long period of time  
10 with a victim that was there, he was standing at the door. It  
11 wasn't a direct path from the sidewalk up. I don't know that  
12 he ever actually testified that he walked up the sidewalk, but  
13 he definitely did not walk from the front door straight back  
14 toward the kitchen. I think he testified that he went directly  
15 where the firearm was, which was directly behind the door --  
16 directly behind the wall, pardon me, Your Honor, that had the  
17 fireplace on it.

18 So, I just don't know what the relevance is to show  
19 a walk-thru that walks straight through back toward the  
20 kitchen. We don't necessarily have a problem with the  
21 dimensions or anything of that nature. I guess it's just to  
22 give the jurors a view of walking into the house. I think a  
23 video could do the same -- could do the same thing for the  
24 jurors. I'm sure Mr. Sindler -- I have a video that we took  
25 when we went to the residence that we could use instead, but if

1 the Court is going to let in the top-down views --

2 THE COURT: And the photos, they'll be renumbered A1  
3 through 9.

4 Mr. Sindler, any rebuttal to what Ms. King said?

5 MR. SINDLER: I really dispute what Ms. King said  
6 about the record from March 3rd. Sywyj said during his first  
7 or second time on the stand back on March 3rd that just beyond  
8 the doorway that was part of the line of sight from the front  
9 door is where Warren was seen. Now, there was some testimony  
10 that I believe was embellished later on where he said, was said  
11 to have seen him to the far right side, which has a different  
12 doorway from the front room and the dining room. But Sywyj  
13 went from the doorway at the front porch into the home as shown  
14 by the animation, finding some table, I think, to the right  
15 side of that dining room once he was inside that dining room.

16 THE COURT: He called it a magazine table, something  
17 like that.

18 MR. SINDLER: He supposedly found the firearm  
19 beneath a magazine or two on a table, but maybe it was a  
20 magazine table.

21 So, we used, based upon, although we didn't hear his  
22 testimony yet because this animation was produced before March  
23 3, but at least that part was consistent with what he said in  
24 his report because he said he had seen him, line of sight from  
25 the front door looking into the dining room through that front

1 room, and we're permitted to provide the context. I think that  
2 the images are fine with respect to what -- I don't know which  
3 letters we have, but it was known as A1 through A9 back in  
4 March, as well as the isometric, which you've already spoken  
5 to, and it's simply 30 seconds. But even if it was 30 minutes,  
6 it provides rather than putting up one screen shot after  
7 another, a fluid, seamless rendering with accuracy as to how he  
8 approached the house.

9           You know what, if he approached the house walking  
10 across the front yard, I'll concede that point, but he probably  
11 used the pathway that was to the right of the front yard.

12           But in any event, we all agree where the front door  
13 was and we seem to agree that for some period of time, he stood  
14 there looking inside. And the record furthermore shows where  
15 he saw Mr. Warren supposedly and then went to that place inside  
16 of that room to look for this firearm.

17           THE COURT: I'm going to take that one under  
18 advisement, although I will say, Mr. Sindler, I think it is  
19 more likely than not, and I want to re-read the suppression  
20 hearing transcript, but based on my read of it, the Court's  
21 prior opinion and the examination of the other exhibits that  
22 will be coming in or will be used by the parties, at this  
23 point, I would say it's more likely than not I will not allow  
24 Mr. Johnson to testify using the animation, or to put it into  
25 the record. I will re-read the suppression hearing transcript

1 one more time.

2           The basis of my ruling is really two-fold. One, in  
3 terms of fit, I think that it is far more of a projected, if  
4 you will, recreation than the isometric floor plan depictions.  
5 I think those are an essentially indisputable recordation of  
6 what the layout is, and I think it's -- it's not inconsistent  
7 with any testimony the Court is currently aware of, those  
8 isometric floor plans, and they are helpful to a factfinder in  
9 discerning the layout of the place where the events in question  
10 occurred, and they also are not prejudicial to the rights or  
11 interests of either party.

12           The animation is a different ball game because it  
13 requires, in the Court's estimation, far more precision of what  
14 happened that night, and there is a high likelihood in the  
15 Court's mind that no matter the argument made by counsel or the  
16 instructions by the Court that the prejudicial effect of the  
17 jury believing that that is, in essence, a movie of what  
18 happened that night outweighs its probative value, given that  
19 the photographs A1 through 9 will come in, if any party offers  
20 them, as will the four isometrics, that is, the static floor  
21 plans with one without the green measurement arrow and three of  
22 them with green measurement arrows of three lengths.

23           So, I'm going to reserve my judgment on the  
24 animation. I want to re-read the suppression hearing  
25 transcript, but in fairness to you, for preparation,



1 Mr. Sindler, based on right now, I think it is more likely than  
2 not I will not allow use of the animation.

3 MR. SINDLER: I respectfully take exception for two  
4 reasons.

5 THE COURT: You're welcome to.

6 MR. SINDLER: One, when you read the record as a  
7 whole, the overriding --

8 THE COURT: Which I just told you I'm going to do  
9 again.

10 MR. SINDLER: The overriding objection by the  
11 government had to do with lighting. Having made a calculating  
12 decision several weeks ago, we put that aside. That's the  
13 first thing.

14 The second thing concerns the fact that the record  
15 is going to show that the archway, not the one that Mr. Sywyj  
16 was standing inside of, but the one that separates the living  
17 room from the dining room was no more than 4 feet. The  
18 isometrics do not give a proper perspective to 12 plus 2  
19 strangers sitting in that jury box -- -

20 THE COURT: But the photographs A1 through 9 may.

21 MR. SINDLER: I'm sorry.

22 THE COURT: The photographs A1 through 9 may.

23 MR. SINDLER: They may, but they don't give it from  
24 the perspective of somebody who is walking, or at the speed the  
25 animation was going from one point to another. More

1 importantly, not even walking, what was it that he was able to  
2 see under the conditions that we'll have under separate  
3 testimony that were rather poor visibility, and the isometrics  
4 don't do justice to that argument.

5 THE COURT: I'll take a look at it.

6 MR. SINDLER: I'm sorry for just stomping my feet  
7 here, but --

8 THE COURT: Well, in fairness to you, Mr. Sindler,  
9 get it out of your system now because I'm about to tell you  
10 that under the rules of evidence, when a ruling is made on an  
11 objection, no exception is needed. If you start making them in  
12 trial, you and I are going to have a problem and it will be  
13 because you're not acting in accordance with the rules.

14 So, whether you're sorry to or not, if you want to  
15 keep on going after I have definitively ruled, or in this case,  
16 not definitively ruled, I've done two things, I've said I'll  
17 give it a whole other look because you've said it's important  
18 to you and in fairness to your trial preparation, I have told  
19 you it's more likely than not at the moment I would not permit  
20 it.

21 So, you have one clear win in that I'm going to look  
22 at it again and one half win in that I've not sandbagged you.

23 But you get it out of your system now.

24 MR. SINDLER: I'll quit while I'm behind.

25 I just wanted to make those two points.

1 THE COURT: They're made.

2 So we'll figure that out. I will issue a ruling on  
3 that. I'll issue a text order that says the other one, the  
4 isometrics, based on the record that's now available to the  
5 Court, will come in.

6 Now, Mr. Sindler, you brought up, I think properly,  
7 what the Court views as the results of the discussions between  
8 counsel. I'm assuming, but either counsel is free to correct  
9 me, that there will be some arguments made by one or both of  
10 you or some observation made by one or both of you to the jury  
11 about the time of year, the date when this incident occurred,  
12 the time of day, and that the photographs that you're seeing,  
13 meaning ladies and gentlemen of the jury, were taken at a  
14 different time of year at a different time of day. And the  
15 jury -- and you'll then make some arguments to the jury as to  
16 what they should do with that. In fact, you may, I'm  
17 anticipating, ask questions of one or more witnesses as to how  
18 any of those things would or wouldn't make a difference.

19 Am I assuming correctly, Ms. King?

20 MS. KING: Yes, Your Honor.

21 THE COURT: Do you have any problem with that when  
22 you or Mr. Sindler do that?

23 MS. KING: No, Your Honor.

24 THE COURT: Mr. Sindler, am I assuming correctly, at  
25 least some of the lines of interrogation that you will be

1 making at trial?

2 MR. SINDLER: Yes.

3 THE COURT: And do you have any problem if either  
4 Ms. King or you go down those -- I can't think of any problems,  
5 but I just figured we'd clear it up now.

6 MR. SINDLER: I don't.

7 THE COURT: It's germane. So you're each going to  
8 talk about that with the witnesses.

9 So, I've ruled on all of the contested exhibits.

10 I've heard from each of you on the importance of  
11 voir dire. And I cannot recall when I have not asked a voir  
12 dire question that a lawyer has asked for in either a criminal  
13 or civil case. Where they're duplicative, I may roll them into  
14 other ones, often they overlap, but I will take, Mr. Sindler,  
15 your point on the two areas that Ms. King raised. I think  
16 there is a Supreme Court case on one. We've clarified the  
17 nomenclature that you want used in the voir dire question, and  
18 I don't have a problem with that, and I didn't hear Ms. King  
19 say there was a problem with that.

20 Ms. King, I'll start with you because your side of  
21 the case goes first, what else should we either resolve today,  
22 or do you or Mr. Ortiz have any questions in terms of how we  
23 sort of do things in Courtroom 6A?

24 MS. KING: The only other -- not the only other, one  
25 other issue just with respect to the proposed points for charge

1 and jury instructions.

2 THE COURT: The final instructions.

3 MS. KING: The final instructions. This actually  
4 might be better addressed at the end of trial, but I did just  
5 want to bring it up now, Your Honor.

6 We did file a joint set of instructions and we  
7 largely agree on the instructions that should be given.  
8 However, the defendant did propose instruction Third Circuit  
9 Model Jury Instruction 4.15, although that might be a typo, but  
10 with respect to eyewitness identification of the defendant.

11 THE COURT: So it's not that Mr. Sindler changed the  
12 model instruction, you're wondering why he would propose the  
13 instruction at all or whether it should be given at all?

14 MS. KING: Yes, Your Honor. It's our position, at  
15 this point at least, that that would not be an appropriate  
16 instruction in this case.

17 THE COURT: Which ECF document? Are you looking at  
18 ECF 108, Item No. 2, Eyewitness Identification of the  
19 Defendant.

20 MS. KING: Yes, Your Honor.

21 Just reading the commentary to that instruction,  
22 Your Honor, the commentary says that this instruction should be  
23 given in any case in which eyewitness identification of the  
24 defendant is an issue.

25 Then I would just direct the Court's attention to

1 United States versus Brown, which is an unpublished decision  
2 from the Third Circuit. I have a copy for the Court and for  
3 defense counsel. The citation is 416 Fed.Appx. 150. It's from  
4 the Third Circuit from 2010. In that case, the defendant had  
5 requested that the court give the eyewitness identification  
6 instruction, and at trial, the law enforcement officer  
7 testified that he had seen the defendant leaving a residence, I  
8 believe, a controlled buy of drugs happened there, and he  
9 specifically testified that he was able to see the defendant's  
10 face as the defendant drove away, and the district court there  
11 refused to give that instruction.

12           The Third Circuit found there was no abuse of  
13 discretion, noting that there was no support in the record for  
14 mistaken eyewitness identification and as a result refused to  
15 give the instruction. So I obviously don't know how the  
16 evidence is going to come in at trial, but at this point, I  
17 don't believe that that would be an appropriate instruction in  
18 this case.

19           THE COURT: Mr. Sindler, without prejudice at all to  
20 your ability to make whatever argument or presentation after we  
21 hear the evidence, I was not surprised by your observation  
22 earlier that you don't ask things of the Court to fill up  
23 space, you thought that an eyewitness instruction is likely to  
24 be one that would be appropriately given in the final charge.

25           Do you want to say now why you think that, or do you

1 want to reserve until we get to that point?

2 MR. SINDLER: We can talk about it now, but you look  
3 at the first sentence of the second paragraph and  
4 identification is the expression of a belief by the witness.

5 Sywyj is not giving his opinion, he's giving his  
6 belief that he saw Warren with a firearm. Well, that  
7 instruction is appropriate. I don't need to state the obvious.  
8 I didn't look at this unpublished opinion, I suppose if this is  
9 more of an important matter there would be something published  
10 and I suppose the government would have that available for us  
11 and the Third Circuit, but it's his belief that Mr. Warren was  
12 there inside of the house with a firearm.

13 He may have been identified later on once the home  
14 was in an orderly way evacuated, it was actually just two or  
15 three people, and later on, within moments, finding the firearm  
16 on that table inside of that room, the decision was made to  
17 arrest him.

18 Well, he was identified outside of the house. We're  
19 permitted to object, we're permitted to contest what happened  
20 moments earlier inside of the house.

21 THE COURT: Thank you, Mr. Sindler.

22 Ms. King, I'll want to look at the case. I will say  
23 it does seem to the Court that an essential element of the  
24 government's proof is that Mr. Atiba Warren was possessing a  
25 firearm, and as I recall the testimony at the suppression

1 hearing, it started with the police officer saying he saw  
2 Mr. Warren possessing a firearm.

3 I think the jury will have to make a decision and  
4 find beyond a reasonable doubt if there is to be a conviction  
5 to be sustained that, in fact, it was Mr. Warren and that he  
6 was, in fact, possessing a firearm.

7 So, I think unless there's a concession or an  
8 admission, I'm not saying there is or should be or shouldn't  
9 be, it does strike the Court that one of the key elements in  
10 this case is going to be the jury's determination of whether,  
11 in fact, Mr. Warren was seen possessing a firearm.

12 So, the odds are I'll give that instruction, but I  
13 think you're right, we'll see how all the testimony plays out,  
14 but I suspect even if four people took the stand and said we  
15 all saw Mr. Warren possessing a firearm, that if Mr. Sindler  
16 asks for an instruction on how a jury is to evaluate eyewitness  
17 testimony relative to the identification of a person, I think  
18 he'd be entitled to that instruction. We'll play it out. It  
19 does seem to be sort of at the heart of the case.

20 Anything else we should take care of today,  
21 Ms. King, either in terms of matters to be resolved or any  
22 questions about how we do things?

23 MS. KING: I don't believe so, Your Honor.

24 THE COURT: Or suggestions about how we should do  
25 things? We try and adapt them to the presentations that



1 counsel is going to make.

2           Mr. Sindler, we'll start with the first one,  
3 anything else you think we ought to resolve while we're here  
4 today?

5           MR. SINDLER: No.

6           I do have two remarks, though.

7           THE COURT: Nothing to be resolved.

8           So, remark No. 1.

9           MR. SINDLER: We did not have an objection to  
10 Government Exhibits 1 through 1 Charlie. We're going to have a  
11 rolling objection, I don't want to do this in front of a jury  
12 panel, that even though we disagree with the suppression ruling  
13 that the firearm is at the heart of the evidence, so I don't  
14 want the record to seem that we've conceded that suppression is  
15 no longer an issue. The gun should have been suppressed. It  
16 wasn't. And any time that this weapon is referred to either by  
17 picture or in physical form, just so it's out there, we just  
18 have an objection.

19           THE COURT: Let me ask you this, Mr. Sindler.

20           So what are you concerned will happen from the  
21 government's side and how should whatever your concern be  
22 preserved?

23           MR. SINDLER: I think I've just preserved it.

24           THE COURT: You did reference your concern that when  
25 the firearm is referred to. Are you concerned that it's going

1 to be referred to in a certain way and that whatever objection  
2 you have to the suppression, that beyond that, the firearm  
3 would be referred to in a certain way that would be a different  
4 and nonetheless important objection?

5 MR. SINDLER: I don't think so. It's just the fact  
6 of the firearm that's going to be in this case by photograph  
7 and physical form.

8 THE COURT: I suspect by the original suppression  
9 motion you made on Mr. Warren's behalf and the points you've  
10 made now, you object to the firearm being part of the quantum  
11 of proof that comes out in the trial of this case. As far as  
12 I'm concerned, you've preserved it.

13 Ms. King, do you believe Mr. Sindler needs to do  
14 anything further or different to preserve his objection to the  
15 firearm being presented as evidence in this case?

16 MS. KING: No, Your Honor.

17 THE COURT: I think you've covered that. As far as  
18 I'm concerned, Mr. Sindler, you've done everything you need to  
19 do to preserve that.

20 MR. SINDLER: The other matter is of a delicate  
21 issue.

22 I was put on notice, it was actually now twice in  
23 this case last week with respect to the evidence that you're  
24 going to consider. Well, we've considered part of it, the  
25 isometrics which appear to have been admitted in this case as

1 well as the animation. The notice went out yesterday -- went  
2 out last week, excuse me, from you that I missed a deadline.

3 THE COURT: You're in compliance. The Court does  
4 not believe that you're in violation of any directive of the  
5 Court.

6 MR. SINDLER: This is now the second time in this  
7 case. It happened several months ago when I was supposed to  
8 file a transcript request. I'm not asking you to retract it,  
9 I'm not sure you would retract an order that you issued last  
10 week, but I did give Ginelle, whose last name I don't know who  
11 is one of the front desk people.

12 THE COURT: One of the docket clerks.

13 MR. SINDLER: I gave her this information. Some of  
14 it was not available in paper form, which I suppose is my  
15 fault, even though I was never intending and still don't intend  
16 to present the isometrics in paper form. So, she and I will  
17 disagree as to whether or not she took my disk, I say she did,  
18 she said she didn't --

19 THE COURT: I ended up getting it the same day when  
20 Ms. King walked a copy up to our chambers.

21 MR. SINDLER: We would both agree if she were here  
22 that I tried to file it that way. It was just surprising to  
23 me, eyebrow raising, that something I was to do I was called  
24 out on the next morning. As you may or may not know, later  
25 that day, I delivered when I then heard from Ginelle that she

1 and I disagree about what happened the day before, I delivered  
2 these paper versions of the isometrics. It's not anything for  
3 you to say, this is my chance to say something about it, that's  
4 all I was intending to do.

5 THE COURT: That's fine, Mr. Sindler. There's no  
6 problem with you saying something about it. If you want,  
7 because it would be true, I will post a text order that says  
8 the Court received all the information it directed to be  
9 received in a timely manner. I'm happy to do that.

10 I will also say you should not feel lonely in those  
11 regards. There were two other lawyers in other cases where  
12 last week I entered similar orders, something was due on the  
13 15th, it didn't come in. As far as I knew, the morning of the  
14 16th, I entered an order and said, I don't have it, and I may  
15 proceed in this way.

16 They were both in civil cases, and I don't normally  
17 do that. I would say in four years here, those are the three  
18 times I've done it. The only reason I did it was we were  
19 dealing with very compressed time frames between when something  
20 was due and a trial was going to begin. The other two related  
21 to matters I have set for trial the week after yours, and  
22 matters set for trial the week after that one, and a bunch of  
23 other deadlines were triggered by those things coming in. So I  
24 didn't do it to be a meany. Again, I didn't do it uniquely in  
25 your situation, I did it in two other cases because they had

1 similar tight time frames for something else, either that I was  
2 expected properly by the lawyers to do something about, or that  
3 all of us were expecting the other lawyer to do about. And the  
4 date I have in mind when I entered the order was today, that we  
5 were going to be here, Mr. Warren was going to be coming in  
6 today and I wanted to make sure I had a chance to look at it  
7 all before we got here today. But I'm happy, because I  
8 don't -- the intention was not either in your case or the case  
9 of the other lawyers to place any blemish on their otherwise  
10 earned professional reputation.

11           It was also signaled both to you and the lawyers in  
12 the other cases, I got half of what we understood was coming, I  
13 don't have the other half and I have had multiple occasions in  
14 the time I've been on the bench where lawyers in good faith  
15 have believed the judge has it and it turned out I didn't have  
16 it and I regretted not telling the lawyers I don't have it.

17           So, that was the basis for my order.

18           We'll enter another order today to indicate that I  
19 have everything and that it was to the Court in an appropriate  
20 fashion. It wasn't delicate for me for you to bring it up.  
21 I'll leave it up to you whether it was delicate for you, but  
22 that's the kind of stuff you should bring up.

23           Anything else, Mr. Sindler, in terms of matters to  
24 be resolved or questions about procedures or anything else?

25           MR. SINDLER: No.

1 THE COURT: Mr. Sindler, will you be making  
2 arrangements with the marshals for clothes for Mr. Warren so  
3 that he has all that?

4 MR. SINDLER: It's already underway.

5 THE COURT: I didn't doubt that, the only reason I  
6 brought it up is one of my colleagues had a trial and it turned  
7 out that morning we didn't have clothes.

8 Anything else, Ms. King or Mr. Ortiz?

9 MS. KING: No, Your Honor.

10 MR. ORTIZ: No, Your Honor.

11 THE COURT: Mr. Babik, anything else we need to take  
12 up?

13 MR. BABIK: Nothing else.

14 THE COURT: What we will do with the screens, you'll  
15 obviously have them on counsel table. This screen will be back  
16 over a little bit on this side of the jury. We usually put the  
17 other screen up sort of back behind Mr. Ortiz. That way the  
18 alternate jurors have a clear view of it also without having to  
19 strain their eyes.

20 So that no one is surprised if you have colleagues  
21 or family members or others coming, you'll see signs we keep  
22 the first row of the pews on each side empty on both sides. We  
23 ask that no one sit in those first rows on either side.

24 Will anyone be asking for sequestration of  
25 witnesses?

1 MR. SINDLER: I will, but I'll also instruct any  
2 witnesses we may have to do the same.

3 THE COURT: Under the rules, once sequestration is  
4 asked, I'll treat that as a request on the record. I'm  
5 obligated to grant it. We will sequester witnesses.

6 I will ask when witnesses are done testifying or  
7 when they're done for the moment testifying, whether any party  
8 anticipates recalling them during the course of the trial.  
9 You're not forever bound by that, but I will then ask is there  
10 any reason I can't tell the witness they may go about their  
11 business. If you think you need them hanging around the  
12 courthouse, just tell me and I'll tell them you need to remain  
13 in the vicinity of the courthouse.

14 I do try and take a break. We'll definitely take a  
15 midmorning break, but if we have been on a long run of things,  
16 I may ask between witnesses, I may tell the jury they're free  
17 to stand and just stretch out. If we do have a sidebar, we'll  
18 do it over there. The chair is for Ms. Kienzle. I do tell the  
19 jury they are free to stand while we're at sidebar so they can  
20 stretch out. We'll put the fuzz box on when we are at sidebar.  
21 Mr. Warren can be at sidebar, if we're over there.

22 I know I say in the trial procedures and I'm sure a  
23 number of judges elsewhere in the building and around the  
24 country talk somewhat negatively about sidebars and too many of  
25 them are a bad idea, but if either of you think that we're

1 headed somewhere dangerous and we need to address it outside  
2 the presence of the jury and it's not disrupting the  
3 examination of the other side, or if I see what I think is a  
4 red flag coming, I'll ask to see counsel at sidebar. It's one  
5 of my goals to provide a fair trial one time for both sides, so  
6 if you do see a problem coming, you're not going to get in hot  
7 water with me if you have a good faith basis for saying, Your  
8 Honor, may we approach, and we'll go over to sidebar.

9           With that, we'll adjourn the hearing. I'll enter  
10 two orders, I'll enter an order now on the isometric, what I'll  
11 call fixed depictions, saying that they're presumptively going  
12 to be allowed in, and I'll then enter a subsequent order on the  
13 animation. I'll enter an order on the docket so it's there  
14 confirming I got the material in an appropriate and timely  
15 fashion from defense counsel, and then we'll get posted the  
16 proposed voir dire and the proposed opening instructions. I'll  
17 put a date in probably Thursday or Friday, if you have any  
18 objections to anything in there to let me know, and then I'll  
19 ask you again on Monday morning when we're here with the jury.

20           Also, I do provide bottled water. You're welcome to  
21 bring bottled water. I'll provide all the water for the  
22 defense table, I don't know what the marshal's rules are in  
23 bringing beverages for a defendant in custody, so I'll make  
24 sure there is a bottle of water available there. You're free  
25 to bring, Mr. Ortiz or Ms. King, any soft drink as long as it



1 has a mechanically closing lid. We provide water to the jury.

2 With that, Mr. Babik, why don't we adjourn this  
3 proceeding.

4 I see Mr. Haller from the U.S. Attorney's office is  
5 here on a different case that Mr. Sindler is involved in.  
6 We'll take care of that business separately.

7 We can adjourn the pretrial conference, Mr. Babik.

8 (Court adjourned.)

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11 CERTIFICATE

12

13 I, Juliann A. Kienzle, certify that the foregoing is  
14 a correct transcript from the record of proceedings in the  
above-titled matter.

15

s/Juliann A. Kienzle, RMR, CRR

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Juliann A. Kienzle, RMR, CRR

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